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Designing Criminal Tribunals

Sovereignty and International Concerns in the Protection of Human Rights

Steven D. Roper and Lilian A. Barria

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DESIGNING CRIMINAL TRIBUNALS

For our mothers, Sharon and Erika,
whose strength and spirit are a source of inspiration

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Preface

The genesis of this book began in spring 2002 in an international law and human rights course. While searching for appropriate readings for the course, we noticed that no volume explored the origins, the structure and the influence of all the newly created international and hybrid criminal tribunals. While there had been much written about the International Criminal Tribunal for the former Yugoslavia (ICTY), and to a lesser extent the International Criminal Tribunal for Rwanda (ICTR), far less of the literature focused on the Special Court for Sierra Leone (SCSL), the Serious Crimes Panel for East Timor (SCPET) and the Extraordinary Chambers for Cambodia (ECC). Indeed, no single volume attempted to analyze and compare all the tribunals in order to draw more general lessons concerning their effectiveness in delivering justice and providing reconciliation. The lack of comparative literature forced us to think about what lessons were important to understand in order to place these tribunals within a historical context.

As political scientists and not legal scholars, we saw these institutions as essentially political in nature and as an outcome of nation-state consensus building following the end of the Cold War. However to truly appreciate these institutions and their broader influence requires an understanding of how international humanitarian law has developed as well as the complexity of the crimes which were committed. Therefore over the course of the last three years, we have endeavored to educate ourselves in international law in order to better understand the tribunals and the importance of cases such as *Tadić* and *Akayesu*. As individuals trained as comparativists, this has been a rewarding intellectual experience which has provided much food for thought and allowed us to venture far outside our intellectual comfort zone.

While all the *ad hoc* tribunals are scheduled to cease operations by 2010 (some much sooner than this), the entry into force of the International Criminal Court (ICC) in 2002 will provide scholars, practitioners and organizations ample opportunity to continue to explore issues of justice, sovereignty and reconciliation. The *ad hoc* tribunals are more than a research project – for many they represent the best hope for justice and societal reconciliation. The tribunals have been established in countries in which a total of over one million individuals have perished, and we hope that our account does justice to the memory of those that have died. While examining the legal reasoning of a specific case or the political debate which occurred in the United Nations Security Council, it is sometimes all too easy to forget that thousands upon thousands who lost loved ones are still awaiting justice.

Numerous individuals have assisted us in our journey to understand the tribunals and the memory of those that are gone. We were fortunate to be able to visit The Hague, Cambodia and Indonesia for vital fieldwork, and we want to acknowledge the financial assistance of Dean Mary Anne Hanner of the College of Sciences

at Eastern Illinois University as well as the Council for Faculty Research which provided a 2005 Fall and Summer Research Award which allowed Dr. Barria to return to Cambodia in March 2005. In addition, we are grateful to the United States-Indonesia Society for providing a grant which allowed us to travel to Indonesia and the US Embassy in Cambodia for a 2004 Target-of-Opportunity Grant during May 2004. Dr. Roper was on leave during the academic year 2004–2005 at the US Air War College which provided a wonderful environment in which to write and to travel. He wants to thank his colleagues for their support and encouragement. It should be noted that the opinions, conclusions and recommendations expressed or implied within are solely those of the authors and do not necessarily represent the views of Air University, the US Air Force, the Department of Defense or any other US government agency.

Over the last three years, portions of the book have been presented at various conferences and workshops, and we want to thank all those that provided essential comments at the American Political Science Association Annual Meeting in 2004 and 2005, the Midwest Political Science Association Annual Meeting in 2003, 2004 and 2005 as well as the Judging Transitional Justice Workshop in 2004. In addition, portions of the research for this book have appeared in different forms in articles, and we want to thank the editors of the *International Journal of Human Rights*, *Human Rights Review* and the *Journal of Human Rights* for allowing us to use ideas from these publications.

We have greatly benefited from discussions and insights with numerous individuals including US Ambassador Pierre-Richard Prosper, Chief Prosecutor Carla Del Ponte and ICTY President Claude Jorda. In Indonesia we benefited from the assistance of the staff at the Indonesian Legal Aid and Human Rights Association, Ifdhal Kasim, Executive Director of the Institute for Policy Research and Advocacy (ELSAM) and IHRC Judge Roki Panjaitan. In Cambodia, we want to thank Dr. Helen Jarvis, Dr. Kek Galabru, Dina Nay and Sok Sam Oeun, as well as Kevin Doyle and the faculty at the Royal University of Law and Economics. Danilo Carlos at the ICTR and Peter Anderson at the SCSL provided invaluable assistance with data collection. We have also benefited from the assistance of outstanding graduate assistants over the years including Chad Cross, Emin Nabiyev and Arne Romanowski. Finally, we have received encouragement for this project over the years from many colleagues and friends, and we especially want to thank our good friend Joe Profaizer for his advice as well as Dave Wight for always picking our brain and making insightful comments. Discussions always seem more productive over a bottle of Lewelling wine.

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List of Abbreviations

AFRC	Armed Forces Revolutionary Council
ASEAN	Association of Southeast Asian Nations
BiH	Bosnia and Herzegovina
CDF	Civilian Defense Forces
CPK	Communist Party of Kampuchea
CSCE	Conference on Security and Co-operation in Europe
DAC	Development Assistance Committee
DK	Democratic Kampuchea
ECOMOG	Economic Community of West African States Ceasefire Monitoring Group
ECC	Extraordinary Chambers for Cambodia
EU	European Union
Fretilin	*Frente Revolucionaria do Timor-Leste Independente*
ICI	International Commission of Inquiry
ICRC	International Committee of the Red Cross
ICC	International Criminal Court
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IHL	International Humanitarian Law
IHRC	Indonesian Human Rights Court
IMT	International Military Tribunal
IMTFE	International Military Tribunal for the Far East
INTERFET	International Force for East Timor
KLA	Kosovo Liberation Army
KOMNAS HAM	National Human Rights Commission
KPP HAM	Commission of Inquiry
NCC	National Consultative Council
NGO	Non-governmental Organization
NPFL	National Patriotic Front of Liberia
OHR	Office of the High Representative
OSCE	Organization for Security and Co-operation in Europe
OTP	Office of the Prosecutor
RoR	Rules of the Road
RS	*Republika Srpska*
RUF	Revolutionary United Front
RPF	Rwandan Patriotic Front
SCPET	Serious Crimes Panel for East Timor
SCSL	Special Court for Sierra Leone

SCU	Serious Crimes Unit
SFOR	Stabilization Force
TNI	Indonesian Military
TRC	Truth and Reconciliation Commission
TRCSL	Truth and Reconciliation Commission for Sierra Leone
UDT	Timorese Democratic Union
UN	United Nations
UNAMIR	United Nations Assistance Mission for Rwanda
UNAMSIL	United Nations Mission in Sierra Leone
UNCHR	United Nations Commission on Human Rights
UNTAC	United Nations Transitional Authority in Cambodia
UNTAET	United Nations Transitional Administration in East Timor
WCC	War Crimes Chamber

Contents

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Chapter 1

From Impunity to Imprisonment: Individual Accountability under International Law

> Before there could be crimes of war there had to be laws of war. Before there could be laws of war there had to be customs of war. Before there could be customs of war there needed to be some sense that war had limits (Well, 1991, p. 91).

It is difficult today to open a newspaper or watch television without some discussion of international law. The genocide in Darfur marks one of the first test cases for the International Criminal Court (ICC) while coverage of the trials of Slobodan Milošević and Saddam Hussein highlight a new era in which heads of state are held accountable for crimes committed under their watch, many of them against their own citizens. The reporting might leave the impression that international law in regards to human rights and humanitarian issues has developed in a linear fashion with ever increasing codification of the law as well as crafting of institutions of justice. The reality is much more complex—the creation of the ICC occurred more than fifty years after Nuremberg, and while the elements of the crime of genocide are well-defined, other criminal acts have just recently been incorporated into notions of crimes against humanity and war crimes. Even with increased codification, the creation of international tribunals has proven problematic. Indeed for some, the trials of Milošević and Hussein represent flawed justice in which either the defendant has been able to prolong and subvert the process or is a victim of "victor's justice" (Meernik, 2003). International law, tribunals and law enforcement mechanisms have developed unevenly in the 20th century as a reflection of political realities.[1]

The struggle to provide justice for individuals who have been the victims of violations of international humanitarian and human rights law has often been a struggle against nation-state sovereignty (Chopra and Weiss, 1992). Historically, international law regulated the conduct and relationship of states and ignored the individual as a subject of the law. The only area of international law that systematically addressed violations of individual rights by states concerned actions by governments against citizens of other states, and it was mostly silent on mandating specific consequences for perpetrators.[2] During the Cold War, heads of state could act with impunity against their own citizens because of the lack of consensus among United Nations (UN) Security Council members (Mingst and Karns, 2000). During this period, heads of

state, as individuals, could use state sovereignty to justify actions and as a shield against criminal charges. It is not surprising that the first of the post-Nuremberg war crimes tribunals to deal with human rights violations and humanitarian atrocities was formed only after the end of the Cold War. However, the end of the Cold War has not created a consensus for a "New World Order." While there have been several war crimes tribunals established since 1993, only two have been created under UN Chapter VII authority which provides guaranteed financing as well as a requirement for state cooperation. In addition while the ICC has been overwhelmingly supported by the international community, states such as the US, China and India remain outside of the system (Mayerfeld, 2003). Finally, the "war on terror" has led to a bitter debate over the protection of rights and definitions of citizenship and soldier. The use of the term "enemy combatant" by the Bush administration in order to avoid obligations under the Geneva Conventions is just one of many examples in which the precepts of international law are being undermined by often legitimate fears of terrorism. In this book, we argue that legal concerns are embedded within a political process (either domestic or international) in which rights and obligations are re-defined based on political necessity.

To hold individuals accountable for their crimes under international law in a meaningful way requires the creation and the implementation of mechanisms designed to provide justice. Despite sporadic efforts to establish a permanent international tribunal, the ICC did not emerge until the late 1990s. Instead, states have established *ad hoc* international criminal tribunals, with the Nuremberg Tribunal the most historically significant until the International Criminal Tribunal for the former Yugoslavia (ICTY). This book examines all the *ad hoc* tribunals created since the early 1990s, including the ICTY, the International Criminal Tribunal for Rwanda (ICTR), the Special Court for Sierra Leone (SCSL), the Extraordinary Chambers for Cambodia (ECC) and the Special Crimes Panel for East Timor (SCPET) as well as the Indonesian Human Rights Court (IHRC) which was a purely domestic response to the human rights violations in East Timor. All these tribunals have been created in order to provide mechanisms to address accusations of war crimes, crimes against humanity and genocide under international law.

The institutions of justice that we discuss in this book have provided the greatest impetus for the development and clarification of international law since World War II. The statutes of the ICTY and the ICTR have advanced the codification of international law, and the early decisions of the ICTY and the ICTR have played an authoritative role in clarifying international legal principles. Each *ad hoc* tribunal has influenced the jurisprudence and practice of others as well as national courts, the ICC[3] and even the International Court of Justice (ICJ). In addition, establishing tribunals for Sierra Leone, East Timor and Cambodia also demonstrated the international community's commitment to end impunity beyond the former Yugoslavia and Rwanda.

However, these tribunals represent a political compromise within the international community concerning issues of sovereignty, finance and authority and reflect a changing political consensus. States have to cooperate in order to carry out a successful prosecution before an international tribunal. Cooperation has to be secured from the

state where the atrocities took place as well as other states with custody of potential defendants and evidence. Where the offenders have been defeated unconditionally, as in Nazi Germany after World War II, these considerations may not pose a significant problem. However, where the offenders retain some degree of political power or remain outside the government's reach, prosecutions before an international tribunal become considerably more problematic.

The four international and one purely domestic tribunal that we analyze were established within a decade of each other; however, there are a number of organizational, legal and financial differences among them. These variations in institutional design were not necessarily based on considerations of how to improve the delivery of justice but often on political and financial concerns. This is not surprising as the history of the Nuremberg and the Tokyo tribunals also reflected prevailing political alignments in which notions of justice were often a secondary concern of states. In this book, we examine both the political realities of these institutions as well as their legal and judicial underpinnings. One of the issues that we frequently explore is how the political compromise which established these tribunals impacted the delivery of justice for victims and the rights of the accused. In short, this book is about the international community, states, victims and defendants. In order to understand the prosecutions discussed in subsequent chapters, we first provide some core definitions of the various subfields of international law in order to place the tribunals within a general legal framework.

The Rationale and Fields of International Law

The focus of this book is on crimes that were committed under international humanitarian law, previously known as the laws of war. The four Geneva Conventions and their Additional Protocols, as well as the Hague Conventions, are the most well-known treaties which cover humanitarian law. These laws define the conduct and the responsibilities of belligerent and neutral states as well as individuals engaged in warfare in relation to each other and to protected persons (*e.g.*, civilians). There are also other customary, unwritten rules of war many of which were explored at the Nuremberg trials. Humanitarian law applies during a period of armed conflict and seeks to limit the suffering caused by war and protect those who have fallen into the hands of an adversary. The law's primary focus is to safeguard the rights of combatants, prisoners of war and civilians. Unfortunately, the historical evolution of international humanitarian law has been characterized by two contradictory trends. While there has been enormous progress in the codification of the law, gross violations continue to occur, particularly in recent armed conflicts where there has been an alarming increase in the types of atrocities and the number of victims.

International human rights law codifies legal provisions governing general human rights in various instruments including the UN Declaration of Human Rights. Human rights law begins to be codified after World War II and can apply either during a time of war or peace, but is primarily concerned with protecting citizens against government violations of their UN-recognized civil, political and social rights.

While the two forms of international law are distinct, the core crimes contained in the fourth Geneva Convention regarding civilians as well as in the UN Declaration are often the same as both laws begin to intersect after World War II. Both forms of law seek to protect individuals from harm and maintain human dignity. Crimes such as rape and genocide are elements found in both humanitarian and human rights law, and therefore the difference between these forms of international law has less to do with the criminal element than the circumstances in which the crime occurred (*i.e.*, whether during war or peace).

While there is a consensus regarding the use of the terms humanitarian and human rights law, the use of "international criminal law" is subject to controversy. Ratner and Abrams (2001) argue that international criminal law deals with international crimes and the tribunals established to adjudicate cases in which persons have incurred international criminal responsibility. While some refuse to use the term, most legal scholars agree that a recognizable body of international criminal law does exist, but the boundaries of this body of law are often unclear. In this book, we use the term international criminal law to refer to those international humanitarian law crimes which are being prosecuted by the tribunals. We also use the more common and less specific term "war crimes" to cover a broad range of crimes committed under humanitarian law including rape, torture and genocide.

There are a number of reasons given as to why under international humanitarian law individuals should be held accountable. First, the pursuit of accountability serves to provide victims with a sense of justice and closure. Second in transitional regimes, accountability can help promote national reconciliation and help society come to terms with the reasons why the law was violated. Third, accountability may deter future violations either by demonstrating to those contemplating such violations the prospect of punishment or more generally by promoting justice, government reform and the rule of law. Finally, the rehabilitation of the offender is regarded as an essential result of accountability and reconciliation. What follows is an overview of the historical evolution of international law and more specifically humanitarian law including the establishment of the Nuremberg and Tokyo tribunals. This historical discussion serves to highlight issues that have not only influenced the evolution of the law but also the institutions created to adjudicate the law including the post-Cold War tribunals which have been constrained by some of the political considerations outlined below.

The Development of International Humanitarian Law before World War II

The regulation of the conduct of war has been a product of domestic and international concerns for centuries but was only codified in the past 150 years. The first major attempt to codify the laws of war was the Lieber Code[4] which was prepared during the US Civil War and promulgated by President Abraham Lincoln in 1863 (Schindler, 2003). Although it was binding only on US forces, the Lieber Code influenced the further codification of the laws of war and the adoption of similar regulations by other nation-states. The Code ultimately formed the basis for the International

Declaration Concerning Laws and Customs of War agreed to at the Brussels Conference of 1874 which led to the adoption of the Hague Conventions on land warfare of 1899 and 1907. At the same time that the Lieber Code was passed in the US, the first International Red Cross Conference was held to address the treatment of prisoners of war, leading to the first Geneva Convention of 1864. These early treaties covered issues concerning the conduct of war such as appropriate weaponry and targets as well as the status of neutrality. They also prohibited the attack of undefended towns, arms which would cause unnecessary suffering, poisonous weapons and included various protections for hospitals, religious and cultural sites as well as family honor. In general, the Hague Conventions regulate the conduct of hostilities while the Geneva Conventions regulate the protection of victims of war. While the codification of international humanitarian law began to advance in the 19th and early 20th centuries, the treaties on the laws of war unfortunately failed to provide protection to civilians during World War I.

At the close of the War in 1919, the Allies appointed a Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties. The Commission was directed to investigate war crimes and to recommend appropriate action against Germany and its allies (Blakesley, 1994). As part of the recommendations of the Commission, the Treaty of Versailles had three articles providing for the creation of an Allied military tribunal for individuals accused of violating the laws and customs of war. While a majority endorsed the recommendations of the Commission, the US representatives objected to the tribunal on the grounds that such a court had no precedent in international law and that international custom prescribed that the soldiers be tried by courts in their own country. Furthermore, the US refused to accept the application of the doctrine of superior responsibility to high officials in government whereby an individual could be prosecuted for having failed to prevent a criminal action. The idea behind the doctrine of superior responsibility was that a leader is responsible for the acts of subordinates if they knew or should have known that a subordinate had committed or was about to commit the acts and that they did not take necessary and reasonable measures to prevent the acts or punish the subordinate. Therefore, this first attempt at an international tribunal to enforce the laws of war was not successful.

Eventually as a political compromise, the Allies consented to allow the Supreme Court of the Reich of Leipzig to try the war crimes cases. The Court only tried twelve individuals out of a list of 900 which was submitted by the Allies. Even with the small number of defendants before the Court, several obstacles hindered the Leipzig trials. In the first place, many Allies, including the US, doubted that anyone could be tried for a war crime unless the defendant's country first criminalized the act. Second, custom dictated that soldiers be tried under the military code of their country rather than under the precepts of the laws of war. Finally, it was asserted that the Geneva Convention of 1864 and the Hague Conventions of 1899 and 1907 did not cover the crimes for which the defendants were charged. While the German defendants were charged for criminal acts drawn from various state legal codes, they were ultimately given light sentences which further demonstrated the inability

of states to hold individuals accountable for their actions. The failure to create an Allied military tribunal as well as the sentences delivered during the Leipzig trials demonstrated that state sovereignty still superseded international humanitarian law and thwarted the creation of an effective mechanism for adjudication (Bass, 2000).

The interwar years did not lead to major developments in the laws of war. While the 1928 Kellogg-Briand Pact outlawed war, the Pact only regulated state behavior by criminalizing aggression and specifically excluded the actions of individuals. Under the leadership of the International Committee of the Red Cross (ICRC), a new Geneva Convention was drafted in 1929 dealing with the treatment of prisoners of war, but efforts to revise the Hague Conventions met with resistance by states. Success proved elusive with respect to the most important problem, namely the protection of civilians against the effects of war, especially aerial warfare. Several proposals were drafted, but none led to the adoption of a binding convention, and thus no treaty for the protection of civilians existed during World War II. However, the horrific abuses of the Holocaust finally forced states to end impunity for individual actions under the laws of war.

The Aftermath of World War II: The Nuremberg Tribunal

In October 1943, a War Crimes Commission was established to begin gathering evidence on war crimes committed by Germany and other states during World War II. On 8 August 1945, an agreement was reached among the Allies for the prosecution and punishment of major war criminals (Meltzer, 2002). In order to avoid a repetition of what had occurred at Leipzig whereby states asserted the right of sovereignty in regards to the prosecution of criminal acts, changes were enacted regarding who could conduct the Nuremberg trials. The Allies took the position that at the close of the war, no German or Japanese government existed and that they constituted the official German and Japanese governments. Thus, the Allies could, in accordance with international custom, organize the proceedings and conduct the trials (ultimately, an assertion of sovereignty). Based on the Leipzig experience, one of the important issues that was addressed before the trials was to identify the appropriate elements of international law which the Axis powers violated. The laws claimed to have been violated needed to have preceded the crimes in question in order to avoid a possible claim of the application of *ex post facto* laws (Tusa and Tusa, 1986).

Article VI of the Charter of the International Military Tribunal (IMT, also known as the Nuremberg Charter) listed the charges under which the accused were to be tried. The charges incorporated under the term "war crimes" included violations of the laws of war, such as the maltreatment of prisoners of war, civilians in occupied countries and devastation not justified by military necessity. In addition, the charges included what was called "crimes against humanity" which addressed the treatment of civilians, especially the attempt to exterminate a group on religious, political or racial grounds. Finally, "crimes against the peace" were also included which involved the planning and waging of an "aggressive war."[5] The Nuremberg Charter relied on

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